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# THE ROLE OF THE FEDERAL GOVERNMENT IN LAND DEVELOPMENT SALES

*Ray J. Walsh\**

## I. Introduction

Since the enactment of the Interstate Land Sales Full Disclosure Act,<sup>1</sup> effective April 28, 1969, its degree of impact upon the subdivision land industry and consumer protection remains inconclusive. On one hand, it has resulted in the assembly and filing by industry of voluminous amounts of information with the federal government ultimately digested in the form of a document known as a Property Report. Such filings under the Act reflect an apparent legitimacy of this historically unbridled American marketing enterprise. On the other hand, the Act has nurtured an increasing awareness in a gullible and affluent American consumer that the purchase of land, particularly "second home," recreational or investment land is an involved and often precarious undertaking. The extent to which the industry has been purged of abuse and the degree to which a buyer need no longer beware, remains equivocal. The Act emerged from instances where ambitious venders produced sales and revenue from unaware buyers, who contributed to their own unawareness by failing to read contractual documents and by being otherwise ignorant of what they were getting into. Approximately two years after the Act's passage there is scant evidence that these same buyers now read the contract they sign and only cavalierly peruse the Property Report which Congress intended they read. Unfortunately, by a technicality in the Act, a buyer's signature on the dotted line of the contract may waive his legislative right to void his contract for failure to receive and understand the Property Report.<sup>2</sup> There are, however, some hopeful signs on the consumer horizon. Numerous public inquiries to HUD now ask whether a particular land developer has filed under the Act and an increasing number of prospective buyers are aware that a "report" of some shape or form is supposed to be given them when they buy.

On the industry side, ignorance of the legislation by developers of the need to comply with the Act is no longer as understandable as during the early days of enactment. An undetermined, but possibly sizeable, number of developers have yet to meet the law's requirements. Unfortunately this failure rests in part on legal counsel not thoroughly knowledgeable with the nature of the legislation and its requirements and counsel's overanxiousness to assuage or exempt his client from the burdens of compliance. Developers have been repeatedly penalized as a result of their attorneys' erroneous advice that they are exempt and need not file a Statement of Record with the Office of Interstate Land Sales Registration.<sup>3</sup>

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1 Interstate Land Sales Full Disclosure Act, 15 U.S.C.A. §§ 1701-1720 (1971 Cum. Supp.). See 24 C.F.R. § 1710.110 (1970).

2 For a statutory description of the document hereinafter referred to as the Property Report, see Interstate Land Sales Full Disclosure Act, 15 U.S.C.A. § 1702 (a)(10) (1971 Cum. Supp.).

3 Office of Interstate Land Sales Registration is hereinafter referred to as OILSR.

Such advice is partially due to the language in which it is drafted, the newness of the statute and the consequent absence of precedent. In this connection some discussion is merited.

## II. Exemptions in General

During slightly more than two years, the OILSR has gotten a very large number of requests or claims of exemption from the Act. As noted previously many of these requests have stemmed from the efforts of overconscientious and ingenious legal counsel. Others are the result of the natural resentment of the private sector against governmental interference and regulatory infiltration. The Interstate Land Sales Full Disclosure Act is not, and has never been, what could be characterized as regulatory. It is simply and solely a disclosure statute. It does not require a developer to do anything but "tell it like it is." Where a developer makes a fair and full disclosure he is subject to no requirements other than those which generally existed prior to the Act, relating to fraud and deceit. Of course, if a developer engages in acts of fraud and deceit, the Act does provide for direct federal intervention and sanction, but in this capacity the Act is no more regulatory than an embezzlement statute. With this in mind, developers and their counsel, meeting the Act for the first time, should approach it from a positive standpoint, considering the advantageous possibilities of filing the required Statement of Record.

The Office of Interstate Land Sales Registration has noted that a rather minute number of developers are exempt from the Act under development structures which existed prior to the passage of the Act. Those that have changed their operation to secure exemption may have ultimately expended more time and energy in qualifying for exemption or in securing a favorable Exemption Advisory Opinion than they would have exerted by affirmative compliance and filing of a Statement of Record. Many developers now find themselves severely hampered by restrictive marketing programs, undue financial burdens and nonlogical development covenants and restrictions. Ironically, many of these developers are being bypassed by the purchasing consumer who is apprehensive of a seller who does not provide him with a Property Report apparently required by the United States Government. Enlightened developers and their counsel have become cognizant of the salutary effects of the use of the Report as a valuable marketing device and as a rein on overambitious sales agents. Intelligent use of the Report by developers has resulted in a direct proportional decrease in the rate of repossessed lots and in lessening the numbers of disappointed lot owners and attendant adverse publicity.

It should be stressed in connection with requests for Exemption Advisory Opinions<sup>4</sup> that the Opinions merely reflect the current OILSR interpretation of the Act; that they are merely "advisory" in character; that they can in no way abrogate the rights conferred upon purchasers; and that they plainly do not make nonexempt sales exempt.

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<sup>4</sup> For an outline of the procedure to be used for obtaining Exemption Advisory Opinions, see 24 C.F.R. § 1710.15 (1970).

In summary, developers and their counsel are well advised to venture cautiously into the exemption area. An initial judgment should be made to see if the disadvantages of filing under the Act are not outweighed by the benefits resulting from filing and the satisfaction of being reasonably sure of not violating a federal law and being subject to various contingent liabilities.

### III. Evasion or Avoidance

The distinction between "evasion" and "avoidance" is legally fine, like most questions of intent. It is relatively simple to cite extreme examples of each. A developer who replats his subdivision into lots of five acres or more and sells nothing smaller thereafter effectively "avoids" the Act by qualifying for exemption under Section 1403(a)(2).<sup>5</sup> On the other hand, a developer who begins to sell renewable \$60 club memberships of one year for the exclusive use of camping, which carry an initiation fee of \$3,000, is, for purposes of exemption under Section 1710.10(m) of the Regulations,<sup>6</sup> clearly evading under the prefatory language of Section 1403(a)<sup>7</sup> of the Act. In each case one must determine whether the object being sold or leased has itself changed, such as lots of five or more acres, or whether merely the means of disposing of the land has been altered.

This reasoning, however, is not easily applied to the "intrastate" exemption except to the extent that one could say that the lots are capable of being purchased solely by situs state residents. In actuality of course the key to this exemption is the alteration of the means of disposal of the lots, due to the use of the word "offering," in Section 1710.10(1)<sup>8</sup> of the Regulatory exemption. Currently, the OILSR looks at the ratio borne by out of state sales to total sales, in addition to examining the use of means or instruments of transportation or communication in interstate commerce, or of the mails. A ratio in excess of several percent raises an *a priori* presumption that the development is "interstate" and subject to the Act. Some developers have currently restricted all of their sales to residents of the situs state with the intention of eventually expanding and filing when the in-state market is exhausted. On the surface this would not appear to be objectionable. However, when a large amount of out of state sales in the subdivision are eventually made, the subdivision can no longer be characterized as one where sales are "entirely or almost entirely intrastate," nor that there ever was a "common promotional plan" in the particular "subdivision" to sell entirely intrastate. The subsequent status of the prior in-state sales is conjectural. It can be said that the Exemption Advisory Opinions rendered to date contain philosophy which looks dimly upon subdivisions which claim to be partly exempt and partly not exempt, due to the term "common promotion plan." The application of this term in the exemption area also appears to negate the possibility of grouping exemptions in connection with one subdivision. For example the Section

<sup>5</sup> Interstate Land Sales Full Disclosure Act, 15 U.S.C.A. § 1702(a)(2) (1971 Cum. Supp.).

<sup>6</sup> Interstate Land Sales Registration, 24 C.F.R. § 1710.10(m) (1970).

<sup>7</sup> Interstate Land Sales Full Disclosure Act, 15 U.S.C.A. § 1702(a) (1971 Cum. Supp.).  
*See* 24 C.F.R. § 1710.110 (1970).

<sup>8</sup> Interstate Land Sales Registration, 24 C.F.R. § 1710.10(1) (1970).

1403(a)(2)<sup>9</sup> exemption has been administratively interpreted to mean that "each and all" lots in the subdivision must be five or more acres in size. As a result, grouping of other exemptions appears impossible in connection with this exemption. Other attempts at grouping, such as splitting a subdivision in half, selling half intrastate and the other half "free and clear," or with an obligation to erect structures, appear precarious considering the words "common promotional plan" and might easily be construed to constitute an evasion of the Act.

#### IV. Particular Exemptions

Some of the difficulty presented by the "intrastate exemption" is expected to end by the enactment of a proposed amendment to the Regulations which will restrict the exemption to subdivisions of less than 300 lots and will require those who qualify to file an affirmative request for an "exemption order." The virtual elimination of this exemption does not entirely resolve the matter however. If a developer is not covered by the Act it is meaningless to talk of his being exempt from the Act. Exemption considerations only arise after it is determined that a particular developer is within the Act, but for one reason or another, under Section 1403,<sup>10</sup> is exempt from the Act's requirements. Thus, if a developer does not in any way "make use of any means or instruments of transportation or communication in interstate commerce, or of the mails" he is not under the jurisdiction of the Act. Such a developer is not exempt by virtue of being entirely intrastate. He is not within the Act because he does not make use of any means or instruments in "interstate commerce" or of the "mails." However, what acts constitute "interstate commerce" may not be so readily discernible. Traditionally, the courts have broadly interpreted the term and have held businesses to be within the Commerce Clause or in interstate commerce and subject to regulation even where the business only indirectly affects such commerce. In *Wickard v. Filburn*<sup>11</sup> a home-grown wheat crop consumed by livestock solely within the state was ruled to be subject to regulation under the Agricultural Adjustment Act and under the Commerce Clause, because intrastate production and consumption of wheat affected the market price throughout the United States. With regard to the regulation of land, it is obvious that land is incapable of any passage across state borders. It is thus equally obvious that the jurisdiction of the Interstate Land Sales Full Disclosure Act relates to matters involving the transaction surrounding the land, such as interstate solicitation, passage of citizens of one state into the situs state as well as passage of documents and other materials involving the means or instruments of transportation or communication in interstate commerce. Construed broadly it is doubtful if many developers conduct their business without employing any of these means. In addition, Section 1404<sup>12</sup> of the Act goes even further to include the use of the "mails." It is almost inconceivable that any developer, in addition to qualifying as not being in interstate

<sup>9</sup> Interstate Land Sales Full Disclosure Act, 15 U.S.C.A. § 1702(a)(2) (1971 Cum. Supp.).

<sup>10</sup> *Id.* at § 1702.

<sup>11</sup> 317 U.S. 111 (1942).

<sup>12</sup> Interstate Land Sales Full Disclosure Act, 5 U.S.C.A. § 1703(a) (1971 Cum. Supp.).

commerce, could also qualify as not using the mail. With this in mind counsel and developers might be well advised to entirely discard any intentions to preclude the Act on this basis.

Another proposed amendment which appears likely to be enacted involves a request for an "order" of regulatory exemption. It is based upon the discretionary power of the Secretary to exempt lots otherwise covered by the Act, where regulation is not necessary in the public interest by reason of the small number of lots involved or the limited character of the offering.<sup>13</sup> Several statutory amendments are also under consideration and will be commented upon later.

While the exemption provided by Section 1403(a)(1)<sup>14</sup> of the Act appears relatively self-explanatory, the simple conclusion that subdivisions containing less than fifty lots are exempt is complicated by the use of the words "common promotional plan" and "subdivision," as the latter term is defined in Section 1402(3).<sup>15</sup> Thus, the number of lots currently being offered or the number of lots currently divided is of no relevance if there is an eventual plan to offer a total of fifty or more, or if the land is *proposed* to be divided into fifty or more lots. Obviously no developer would be covered by the Act if he was permitted to sell off individual blocks of less than fifty lots. Also, in view of the definition of "subdivision" it is fruitless to designate different sections of the same subdivision by diverse names if in reality the total land is being offered as one "common promotional plan" and, as the Act makes clear, "contiguity" of the land is not crucial in finding an offering to be part of the same plan. A developer offering fifty or more noncontiguous campsites scattered throughout a state, or throughout various states, would be covered by the Act, and all of the campsites, proximate to each other or not, would be required to have a statement filed on their behalf.

The exemption provided by Section 1403(a)(3)<sup>16</sup> appears less vague than some of the others. A number of developers have received favorable Exemption Advisory Opinions on this basis. Such opinions, however, have consistently maintained that in addition to unconditionally obligating the seller to erect a structure within two years of the date of sale, he must extend the obligation to other facilities incident to the structure, such as water and sewer accommodations. The Opinions have likewise indicated that in order for condominium sales to secure this exemption, the obligation to erect within two years dates back to the time of the first unit sale in the condominium, rather than two years from the sale of the particular unit. This interpretation results from the legal concept that each purchaser of a condominium unit has an undivided fractional ownership in all of the condominium facilities, easements and common areas, and hence the required obligation to construct the entire condominium complex within two years of the first unit sale.

Since the effective date of the amendment to Section 1403(a)(10) of the Act on December 24, 1969,<sup>17</sup> and Section 1710.10(j) of the Regulations on April 14,

<sup>13</sup> See, e.g., *id.* at § 1702(b).

<sup>14</sup> Interstate Land Sales Full Disclosure Act, 15 U.S.C.A. § 1702(a)(1) (1971 Cum. Supp.).

<sup>15</sup> *Id.* at § 1701(3).

<sup>16</sup> Interstate Land Sales Full Disclosure Act, 15 U.S.C.A. § 1702(a)(3) (1971 Cum. Supp.).

<sup>17</sup> *Id.* at § 1702(a)(10).

1970,<sup>18</sup> a developer must annually file materials with the Secretary to qualify for the exemption. He cannot simply "sit tight" claiming that the land is unencumbered and that all purchasers personally inspected the land at the time of sale. A particular area of difficulty regarding this Section of the Act involves the provisions requiring that any reservations or restrictions on the property be "beneficial" and "enforceable by all lot owners." What is beneficial to one purchaser need not be so to another, and the absence of some restrictions not strictly beneficial to all lot owners may result in a poorly planned and unworkable subdivision. Such may also be true of the enforceability requirement. It is often desirable to retain in the developer certain restrictions until such time as the subdivision and its facilities can be feasibly transferred to the property owners. Unfortunately, some developers are tailoring their subdivisions and eliminating prior reservations simply to qualify for the exemption, an outcome hardly intended by Congress when it enacted this exemption.

Recently several developers in seeking this exemption have divided their subdivision into various offerings and sections, prescribing different restrictions in the several sections, enforceable only by the lot owners in the individual sections. Such portioning obviously fails to meet the requirement that all of the restrictions be enforceable by all lot owners in the "subdivision," as that term is defined in Section 1402(3).<sup>19</sup>

Brief comment is useful concerning a subsection of Section 1710.101<sup>20</sup> which has been frequently misread by counsel and their clients. Subsection (9) of this Section contains language to the effect that "the contract of sale requires delivery of a deed to the purchaser within 120 days of signing the contract." This is intended merely to fix the date of sale for purposes of determining at what point the land must be "free and clear of all liens, encumbrances, and adverse claims." It does not require a developer to deliver a deed to a buyer within 120 days of sale. What it does mean is that a developer has 120 days from the date of sale to unencumber the property and still qualify for the exemption. Thus, if the land is not encumbered at the time the sales contract is signed, this subsection has no relevance in qualifying for the exemption. This of course is equally true of the language contained in part (b) of this subsection.

#### V. Filing Matters

Statements of Record are filed with the OILSR and assigned to the Examination Division for review. A properly prepared Statement should normally expect to receive an effective date letter within ten to fifteen days from the date it is filed. This period will vary depending upon current volume filed with the office. Subsequent offerings of lots in a subdivision currently effective are submitted as consolidations to the prior filing and incorporate by reference all of the new information with the effective Statement of Record.

A particular problem arises concerning the expiration or withdrawal of a

18 Interstate Land Sales Registration, 24 C.F.R. § 1710.10(j) (1970).

19 Interstate Land Sales Full Disclosure Act, 15 U.S.C.A. § 1701(3) (1971 Cum. Supp.).

20 Interstate Land Sales Registration, 24 C.F.R. § 1710.101 (1970).

Statement of Record which has become effective. One can only speculate upon the status of a Statement of Record for a subdivision after all of its lots have been sold. As a document of historical relevance it is maintained by the OILSR for an indeterminate period. However, in a large subdivision where a considerable amount of forfeitures and repossessions are likely to occur it is obvious that the Statements possess more than mere historical value. Indeed, some subdivisions have been filed with the OILSR which were entirely sold at the date of filing.

The status of a Statement of Record which a developer wishes to withdraw is only slightly less speculative. At least one known developer who had an effective Statement of Record for his subdivision decided to restrict all future sales to residents of the situs state rather than submit consolidations for additional lots. The developer did not notify the OILSR of his intention to withdraw the Statement of Record which was currently effective. Query: What is the status of the sales of the lots upon which there was no effective filing? It can be said that the OILSR frowns upon a subdivision being both exempt and not exempt, particularly where there remain lots in the subdivision subject to the effective Statement of Record which are being marketed in conjunction with lots being offered solely to residents of the situs state.

Section 1407(c)<sup>21</sup> of the Act requires a developer to file an amendment to an effective Statement of Record where a change occurs affecting any material fact required to be contained in the Statement, and Subsection (d) provides for suspension of effective Statements where the filing contains an untrue statement or omits to state a material fact. Response to this section of the Act by developers and their legal counsel has been sorely delinquent. A plausible explanation of this failure partly lies in the interpretation of what constitutes a "material change" or a "material fact." Certainly anything is "material" which concerns a matter in the Statement which relates either to the deletion or addition of promises being made by a developer to purchasers, as well as any financial circumstances affecting such promise, either by way of the capability of the developer to fulfill the promise or involving financial obligation upon a buyer. For example, a currently effective Statement of Record indicated, as part of the effective Property Report, that buyers' and property owners' sole financial responsibility consisted in assessments for maintenance facilities. In reality, it was subsequently found that the developer, while in control of the property owners' association, obligated the association to the extent of several hundred thousand dollars to be paid to the developer by the association for having constructed a lavish clubhouse. When the association was transferred to the property owners they learned that the clubhouse, which materially induced them to purchase the land, had yet to be paid for and was to be paid for by them out of assessments already severely depleted by other maintenance costs. The developer's failure to cite the existence of this large encumbrance constituted a failure to disclose a "material" fact and as such was a direct violation of Subsection (d). Administrative action resulted, requiring immediate amendment of the Statement; its voluntary suspension prior to amendment; and providing purchasers the option to revoke their contracts. We suspect that property owners' associations will

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21 Interstate Land Sales Full Disclosure Act, 15 U.S.C.A. § 1706(c) (1971 Cum. Supp.).



eventually generate the largest single category of complaints involving nondisclosure. Property owners' associations are not unlike other public or municipal bodies except to the extent that they are private entities, frequently lacking the authority and power provided legislatively to public bodies, but subject to many of the same problems in organizing a community. If a developer has initially set adequate guidelines and realistically equipped the association, a viable private entity is possible. If he has not, eventual chaos is the likely result. When developments mature timewise to the extent that the lot owners are given control of the association, inherent problems, lying dormant prior to passage of control, will suddenly surface. Most lot purchasers have little idea of the extent to which they bind themselves by simply executing a contract of sale which contains an obligation to be bound by the rules and regulations of a developer-association. When they purchase, the association is almost always under the entire and unfettered control of the developer who can change or extend such rules at will. Normally only after all of the land in the development has been marketed does the transfer of the association to the lot owners occur and often such lot owners only then discover the degree to which they are obligated. They may discover that the developer has an unlimited power to assess them for items completely unconnected with their property; or that prior maintenance charges set by the developer are vastly inadequate for their intended purpose; or that a central sewer or water system will be required as lot owners continue to build; or that roads or other facilities in the development do not comply with local or state requirements, either for purposes of dedication or otherwise.

In summary, most land developers do not contemplate their perpetual co-existence in the development which they are marketing. When the land which they are selling is exhausted they turn elsewhere to new areas to market with the intention of maintaining any residual obligations in former developments to a minimum. Since the typical developer's "cash flow" terminates when a development is entirely sold, the acquisition of new land and concentration on its marketing are indispensable to the company's continued existence. As a result of this developer exodus, the necessity of disclosing the effects of such an eventuality is crucial in enabling a prospective purchaser to make an informed judgment to buy land in a development which carries with it an obligation to be a member of an association and subject to its regulations. The importance of such disclosure may be no less critical for a developer. A failure to make a complete disclosure in this regard may eventually haunt him and may subject him to extensive lot owner litigation and numerous government sanctions, when his finances can least afford any adverse intrusions.

## VI. Enforcement

In an effort to restore purchasers to as near a position as they would have occupied by developer compliance, OILSR has had developers making sales or leases prior to effective registration notify all purchasers that they have a right to revoke their contracts since they did not receive an effective Property Report at the time of sale. This notification procedure has resulted in thousands of letters

being sent by developers accompanied by a copy of a now-effective Property Report for the subdivision. Hopefully, possessing such a Report, the purchaser can now make an informed judgment concerning his purchase. In those cases where the purchaser has already received a deed the procedure has been adopted to insist upon the option to reconvey and receive a complete refund of any consideration which has been parted with. In the past, since the developer's failure to register rested partly from ignorance of the Act or his mistaken belief that his sales were exempt from the Act, criminal prosecution for wilful violation of the Act has been seldom recommended. However, since the Act is no longer novel, such failure to register can now be expected to entail more than mere restoration of a purchaser to status quo and will be likely to involve injunctive proceedings and the imposition of criminal penalties under Section 1418<sup>22</sup> of the Act. Past experience with purchaser notification has indicated that the percentage of those exercising their option to revoke or reconvey bears a direct relationship to the quality of the development and the manner in which the sales were made. Since many land sale contracts are factored and discounted to financial institutions the notification procedure is carried over to include those discounted contracts based on the theory that the right of revocation continues under the assignment and is available against third parties. Parenthetically, the right of revocation in a purchaser has been interpreted to be personal in nature and would not be available to an assignee or vendee of the contract from the original purchaser.

In some cases, even though a developer has an effective filing with the OILSR, if it can be shown that the filing or accompanying Property Report has been materially defective, purchasers receiving such a defective Property Report have also been notified of their right to revoke on the theory that the Report was so defective as to constitute no Report whatsoever.

To date there have been no formal suspension hearings conducted by OILSR. There have been various occasions, however, where a developer has voluntarily suspended an effective Statement of Record or voluntarily withdrawn applications for Statements or Consolidations. It has been and continues to be our philosophy that if compliance can be achieved through such means recourse to formal hearings is an unnecessary burden for both developers and us.

In attempting to resolve the status of a developer under the Act, where the developer does not come forward with affirmative information or where there is reason to believe that such information is inaccurate, written interrogatories will be directed to the developer or his counsel. The interrogatories are designed to elicit pertinent facts concerning the developer. They do not represent a conclusion or a presumption that the developer is within the purview of the Act. Where there is a failure to respond to the interrogatory, normally subpoenas *duces tecum* or *ad testificandum* will be issued to compel the production of pertinent written documents and materials disclosing the type of development involved. If the subpoenas are not obeyed or involve contumacy, the OILSR will proceed to seek a court order requiring the production of the relevant information. Currently, two injunctions have been secured against developers, one of whom has been recommended for criminal prosecution.

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22 *Id.* at § 1717.

It is a known fact that many developers do not allow purchasers a sufficient opportunity to read and examine the Property Report prior to signing a contract of sale. Based upon complaints received by the OILSR, the Report is often furnished simultaneous or just subsequent to the signing of the contract by the purchaser as one more document in a bundle of others. Virtually all of the contracts provide (as is permitted by the Act) that the buyer acknowledges by his signature that he has received, read and understood the Report and thereby waives the right to revoke. Thus, even if a purchaser has received no Property Report whatsoever, his signature says that he has. When a pattern of complaints against a particular developer consistently claim a lack of opportunity to review the Report, the OILSR takes the position that this is the developer's standard practice. A developer is reprimanded to this effect and is requested to advise all purchasers who were not provided with a meaningful delivery of the Report that they may now revoke their contract.

### VII. Hearings

The hearing procedures are nearing final form. Proposed Regulations were published in the Federal Register, January 21, 1971 (pages 985 to 994). Revisions are being made since we wish to keep the procedures as simple as possible and yet in compliance with the Administrative Procedure Act. The procedural Regulations will be Part 1720 of 24 CFR. Compliance to date has been achieved on a voluntary basis and we anticipate that even after the procedural Regulations are in effect, that compliance will be for the most part done through consent orders without formal hearings.

### VIII. Legal and Quasi-legal Questions

More than a few legal questions, whose conclusive resolution can only be speculated upon until precedent is established or until the matter has received judicial pronouncement, have arisen regarding the Act and its interpretation. One such question involves the application and effect of the common law doctrine of "merger" upon purchasers' rights under the Act. Some developers and their counsel have argued that the delivery of a deed to a purchaser effectively extinguishes any rights of revocation or voidability which a purchaser may otherwise have had under a prior contract of sale. Since Section 1404(b)<sup>23</sup> of the Act states that a purchaser may void or revoke his contract if he is not furnished a Property Report prior to or at the time of sale, failure to receive such a Report would normally allow him to get out of his contract. However, in view of the doctrine of "merger," it is argued that since the right of revocation contained in the contract of sale is not a term in the deed, the delivery of the deed discharges the contract and eliminates the right of revocation and voidability. In support of this argument the theory is advanced that the Act provides such a purchaser with a right of recovery under Section 1410,<sup>24</sup> which is an entirely adequate remedy; and also, that the main intent of the Act was to ensure that a buyer

<sup>23</sup> Interstate Land Sales Full Disclosure Act, 15 U.S.C.A. § 1703(b) (1971 Cum. Supp.).

<sup>24</sup> *Id.* at § 1709.

receives a deed to the property which he purchases. It has always been and remains the position of the OILSR that no purchaser rights of revocation or voidability are lost by the mere delivery of a deed. It is not felt that the remedy provided by Section 1410 is entirely adequate since the Congressional Hearings which preceded the Act continually reflect that defrauded buyers either cannot afford, or do not consider employing counsel, and indeed, would not be in the position they now find themselves in, if they were the type that employs legal counsel. Also, the Hearings manifestly disclose that the Congress did not merely intend that buyers should be ensured delivery of a deed. As a matter of fact, they contain examples of extreme fraud where buyers did receive deeds, but the property conveyed was either swampland, under water, or subject to a flood-control easement. Traditionally, the concept of "merger" has been applied to those situations where a party to a contract of sale complains that the delivery of a deed does not represent full performance of the contract and constitutes a breach of that contract. The courts have indicated that those terms not specifically carried over into the deed become merged into the deed and cannot then be reasserted. However, the number of exceptions to the application of the doctrine are multiple. Such exceptions partly consist of the preservation of terms which are collateral to, or distinct from, the subject matter of the contract. The courts have said:

The many exceptions to the doctrine of merger are for the most part applied in cases where either the grantor or grantee is attempting to enforce against the other, stipulations in the antecedent contract which are not contained in, not performed by, and not inconsistent with the deed, and which are held to be collateral to or independent of the obligation to convey.<sup>25</sup>

And further:

In all cases then where there are stipulations in a preliminary contract for the sale of land, of which the conveyance is not a performance the true question must be whether the parties have intentionally surrendered those stipulations. The evidence of that intent may exist in or out of the deed. If plainly expressed in the very terms of the deed, the evidence will be decisive. If not so expressed the question is open to other evidence, and I think in the absence of all proof there is no presumption that either party in giving or accepting a conveyance, intends to give up the benefits of the covenants of which the conveyance is not a performance or satisfaction.<sup>26</sup>

It should be self-evident that a purchaser who does not receive a Property Report at the time of sale, who has no indication that he has a right under law to receive such a Report, and who has no knowledge that failure to receive such a Report entitles him to revoke his contract, can hardly be concluded to have intended to give up the benefit of receiving the Report and the benefit of such a stipulation in his contract. It has been held that the doctrine of merger is inapplicable in a situation which involved a contract for the sale of land containing a clause by which the seller agreed to repurchase the land at the buyer's option.<sup>27</sup> The court said that the contract antecedent to the deed clearly showed that there

<sup>25</sup> *Snyder v. Roberts*, 45 Wash.2d 865, 872, 278 P.2d 348 (1955).

<sup>26</sup> *Morris v. Whitcher*, 20 N.Y. 41, 47 (1859).

<sup>27</sup> *Siebro Finance Corp. v. Kerman*, 232 App. Div. 375, 249 N.Y.Supp. 497 (1931).

was no intention on the part of the parties that the repurchase option in the vendee should be merged in the deed and as a result such merger was not effected. It is submitted that a contract containing an option to void or revoke is analogous to one with an option to reconvey. Naturally, if the revocation language does not appear at all in the antecedent contract, as required by the Act, it seems obvious that the doctrine of merger in such a case is entirely irrelevant. Finally, it is almost universally held that the doctrine of merger is inapplicable where there is the presence of fraud, misrepresentation, or concealment of fact and that such facts of which a party has no knowledge or of which he was misinformed do not merge into the deed.

### IX. Liaison with States

Notwithstanding the admonition of Section 1409<sup>28</sup> of the Act, requiring cooperation with state authorities similarly concerned with regulating the sale of land, it is apparent that OILSR would so proceed of its own accord. Since the passage of the federal legislation, a growing number of states have become increasingly vigilant in protecting their citizens as prospective consumers of subdivided land. These efforts include the passage of new legislation or indirect enforcement under state real estate commissions, existing plat approval statutes, environmental control agencies, or investigation and compliance procedures handled directly through the state departments of justice.

A number of states have recently enacted statutes requiring registration by developers with their state and the distribution of a document to prospective purchasers, all of which may be virtually satisfied by a developer's effective filing under the Interstate Land Sales Full Disclosure Act.<sup>29</sup> In addition to these states, and those "acceptable" states under Section 1710.25<sup>30</sup> of the Regulations (Florida, New York, California and Hawaii) a number of other states require registration of one form or another, sometimes under the state division of securities, or with an appropriate real estate licensing agency.<sup>31</sup> Some of these states do not, however, provide any regulation whatsoever where the land which is being offered has its situs within that state and do not provide for the delivery of any report or offering statement to prospective purchasers. A few of these states have recently begun to detect the danger of allowing their land to be indiscriminately developed and marketed, even though the prospective danger to their citizens is lessened by the proximity of the land. They have also discerned the weakness of a state statute which does not require registration by "nominal" owners of the land who are really mere brokers. Other states require various forms of state approval short of actual registration and have no document for distribution to prospective purchasers.<sup>32</sup> The remaining states successfully regulate the sale of subdivision land only to the extent to which the state attorney general or allied

28 Interstate Land Sales Full Disclosure Act, 15 U.S.C.A. § 1708 (1971 Cum. Supp.).

29 *E.g.*, Alaska, Connecticut, Massachusetts, Nevada, North Dakota, New Hampshire.

30 Interstate Land Sales Registration, 24 C.F.R. § 1710.25 (1970).

31 *E.g.*, Arizona, Georgia, Illinois, Kansas, Montana, New Jersey, Oregon, South Carolina and Wisconsin.

32 *E.g.*, Arkansas, Colorado, Indiana, Iowa, Maine, Michigan, Minnesota, Missouri, Nebraska, Ohio, South Dakota, Tennessee, Utah, Vermont, Washington and North Carolina.

state departments wish to involve themselves.<sup>33</sup> Other than the exchange of information relating to whether a particular developer has filed with a state or with OILSR, or to the extent that either has information concerning a developer, the primary liaison with states has been their submission of information relating to developer compliance with local requirements involving health, safety and welfare. Numerous amendments to effective OILSR filings have been required as a result of the disclosure of data by the states relating to the deficiency of a developer's prior disclosure. Such data include failure by a developer to comply with state regulations relating to sewage disposal, water facilities, road or street maintenance, street dedication, and escrow or bonding specifications. Several states have been especially helpful by their prompt exercise of injunctive powers in stopping questionable land sale promotions where immediate federal intervention was impracticable.

State expertise has played an invaluable role in educating those charged with the administration of the federal legislation. An anecdote recalled by a prominent state official characterizes the immense task of protecting unknowing purchasers of land. The official described a meeting with a land buyer who just discovered his lot was under water. The official advised him to go back to the seller. When the official asked him upon his return how he had made out, the buyer replied that he now had bought two lots, both under water.

## X. Proposed Amendments to the Act

The more notable contemplated changes in the Act include, first, an amendment increasing the number of lots from 49 to 99 under Section 1402(3),<sup>34</sup> in an effort to relieve smaller developments from filing under the Act. This amendment springs from the conviction of OILSR that a subdivision consisting of less than 100 lots is either likely to be not in interstate commerce or of such limited character as not to warrant the expenditure of time better devoted to the more numerous large developments and their utilization of mass-media solicitation. Also, smaller developments of this number generally tend to scale down the number and type of promised improvements, thereby lessening the possibility of deception in this regard. A second proposal calls for the entire deletion of Section 1403(a)(2)<sup>35</sup> which currently exempts the sale of subdivision lots of five or more acres in size. This amendment is based on the feeling that the offering of larger acreage merely provides an opportunity to market land which is of such little value that it can be competitively sold at prices equivalent to that of smaller acreage. For example, arid desert land becomes of no more value simply because there is a large amount of it. Zero plus zero still equals zero. However, the Regulations and the Act are under revision to authorize certain discretionary exemptions in cases of particular hardship, or where there is no overriding and legitimate public interest, and, where applicable, such larger acreage may be exempted on this basis.

<sup>33</sup> *E.g.*, Alabama, Delaware, Idaho, Kentucky, Louisiana, Maryland, Mississippi, Oklahoma, Pennsylvania, Rhode Island, Texas, Virginia, West Virginia and Wyoming.

<sup>34</sup> Interstate Land Sales Full Disclosure Act, 15 U.S.C.A. § 1701(3) (1971 Cum. Supp.).

<sup>35</sup> *Id.* at § 1702(a)(2)

Thirdly, as a result of considerable developer confusion arising from the exemption provided by Section 1403(a)(10),<sup>36</sup> and the difficulty in administering it, the deletion of this entire subsection is proposed. This amendment is conceived on the basis that the purpose of the Act goes beyond the insurance of mere delivery of unencumbered title and has heretofore encouraged various developers to dilute their developments simply in an effort to fit the exemption's narrow requirements.

Briefly, other proposed amendments to the Act include:

(1) an attempt to widen the scope of regulatory exemption authority to permit the exemption of certain types of land sales such as "auctions" and certain classes of affected persons such as trustees under "dry trusts," both of which may be technically covered by the Act but which are not felt to come within the intended purview of the Act;

(2) the inclusion of "foreign" commerce for land in Section 1404(a)<sup>37</sup> to specifically include all land beyond the borders of the United States and its territories and possessions, if such land is being offered to citizens within such borders;

(3) amendment to Section 1404(a)(1)<sup>38</sup> to include "offers" to sell or lease, to eliminate any question of the jurisdiction of the Act over promotional solicitation occurring prior to the time of the actual sale;

(4) the insertion of appropriate language in Section 1404(b)<sup>39</sup> to clarify a purchaser's right of revocation, and to eliminate any conjecture regarding the duration of this right, as well as to prevent the undue extinguishment of what is regarded as the purchaser's strongest remedy under the Act. And, in this connection, a further amendment to this subsection is contemplated, expanding the period of allowable revocation from 48 hours, to three business days or 72 hours, and elimination of the provision allowing a waiver of the right of revocation.

## XI. Conclusion

Although the Interstate Land Sales Full Disclosure Act has been in force for more than two years, its effectiveness in an operational sense has yet to reach full potential. The reason for this, as stated at the outset of this article, is due in part to the legal profession's lack of knowledge with the nature of this legislation and the consequent erroneous legal advice that the profession has given to developers and consumers alike. No doubt much of the confusion is due to the language in which the Act is drafted, the newness of the statute, and the absence of precedent. It is the feeling of this Office that the effectiveness of the Act is somewhat proportionate to the legal profession's knowledge and familiarity with the Act. It is to this end—to acquaint the legal profession with the administrative implementation of the Interstate Land Sales Full Disclosure Act—that this article has been directed.

<sup>36</sup> Interstate Land Sales Full Disclosure Act, 15 U.S.C.A. § 1702(a)(10) (1971 Cum. Supp.).

<sup>37</sup> *Id.* at § 1703(a).

<sup>38</sup> Interstate Land Sales Full Disclosure Act, 15 U.S.C.A. § 1703(a)(1) (1971 Cum. Supp.).

<sup>39</sup> *Id.* at § 1703(b).